IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-263

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTI CHI; FRED P. McNEESE, ROBERT McALISTER, ROBERT HITT, individually as news reporters and as members, officers, and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION; DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION; THE ENTERPRISE, INC.; EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS,

Petitioners,

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; MARK W. BUYCK, JR., Esq., United States Attorney for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshall for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MITCHELL ROGOVIN
DAVID BOYD
Rogovin, Stern & Huge
1730 Rhode Island Ave., N.W.
Washington, D.C.

JACK C. LANDAU
Reporters Committee
For the Freedom of the Press
1750 Pa. Ave., N.W.
Washington, D.C.

JAMES C. HARRISON, JR.
COSTA M. PLEICONES
Harrison & Pleicones
1010 Barringer Bldg.
Columbia,
South Carolina

Counsel for Petitioners

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTI CHI; FRED P. McNEESE, ROBERT McALISTER, ROBERT HITT, individually as news reporters and as members, officers, and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION; DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION; THE ENTERPRISE, INC.; EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS,

Petitioners.

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; MARK W. BUYCK, JR., Esq., United States Attorney for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshall for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUBJECT INDEX

TABLE OF CASES

ARTICLES

OPINION SOUGHT TO BE REVIEWED

This petition for certiorari seeks review of the decision of the United States Court of Appeals for the Fourth Circuit in *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al.,* F.2d (No. 77-1636, 4th Cir. May 17, 1977), which substantially sustained an order restricting media reporting of a criminal trial based on the opinion of the United States District Court. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Marin, Jr., et al.,* 431 F. Supp. 1182 (D.S.C. 1977).

JURISDICTION

The opinion presented for review was decided on May 17, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for this Court's review are the following:

1. Whether the restrictive order entered on May 31, 1976, in *United States v. J. Ralph Gasque, et al.,* Crim. No. 76-104, is valid under the First Amendment to the United States Constitution;

2. Whether the restrictive order entered on May 31, 1976, in *United States v. J. Ralph Gasque, et al., supra,* is valid under the Fifth Amendment to the United States Constitution; and

3. Whether, in the exercise of its supervisory powers over the lower federal courts, this Court should require that district courts entering restrictive orders of this kind must precede such orders by notice and the opportunity for a hearing to interested parties and must accompany them with a written opinion articulating the basis on which they are entered.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED UPON

Constitutional Provisions

The petition for certiorari presents issues arising under the First and Fifth Amendments to the United States Constitution. The relevant portion of those Amendments are the following:

First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Statutory Provisions

Also relied upon as a predicate to one element of the claim under the First Amendment is section 1866(a) of the Jury Selection and Service Act, 28 U.S.C. § 1861, which provides, in pertinent part, that the names of persons that may be required for assignment to grand or petit juries be "publicly draw[n] at random from the qualified jury wheel . . ."

REASONS FOR GRANTING THE WRIT

I. STATEMENT OF THE CASE

A. Introduction

In *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976), this Court articulated the constitutional standards applicable to classic prior restraints on the reporting of matters relating to criminal trials. Although the Court refrained from ruling that such prior restraints can never be sustained, the rigorous standards set forth in its opinion invariably point to that conclusion. *See id.*, at 570, 570-71 (White, J., concurring); *id.*, at 572, 572-73 (Brennan, J., concurring in judgment).

Thus, following *Nebraska Press Association,* judicial attempts to impose classic prior restraints on the reporting of matters related to criminal trials will largely disappear. Throughout the nation, however, trial courts increasingly are resorting to methods that indirectly achieve what could directly be accomplished only by satisfying the rigorous and perhaps insuperable standards of *Nebraska Press Association;* orders increasingly are being entered that exact the same censorial impact by denying newsmen access to critical information.

The Courts of Appeals and state courts are in hopeless disarray in attempting to articulate and apply the constitutional standards by which restrictive orders of this kind must be assessed. For example, although the Fourth and Tenth Circuits now require only that a "reasonable likelihood" of threat to a fair trial be found to justify the entry of orders of this kind, *see Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al., supra; United States*

v. Tijerina, 412 F.2d 661 (10th Cir. 1969), *cert. denied*, 396 U.S. 990 (1969), the Sixth and Seventh Circuits have concluded that such restrictive orders can only be sustained upon a finding that they were entered in response to a "serious and imminent threat" of interference with a fair trial. *CBS, Inc. v. Young*, 522 F.2d 234, 241 (6th Cir. 1975); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1974), *cert. denied sub nom., Cunningham v. Chicago Council of Lawyers*, 427 U.S. 912 (1976). This case affords the Court the opportunity to articulate and apply the proper constitutional standards, and thus to provide much-needed guidance on the important and increasingly litigated questions of constitutional law that remain unresolved after *Nebraska Press Association v. Stuart, supra*, 427 U.S. at 564, n.8. This petition also poses an equally important question regarding the kinds of procedural safeguards that should precede and accompany the entry of orders of this kind, another issue on which the Courts of Appeals are divided. Compare *Central South Carolina Chapter, Society of Professional Journalists, et al., supra*, with *Schiavo v. United States*, 504 F.2d 1 (3d Cir. 1974), *cert. denied sub nom. Ditter v. Philadelphia Newspapers, Inc.*, 419 U.S. 1096 (1975).

B. Fundamental Impact of the Challenged Order

The overall effect of the challenged order is to impose sweeping, and in some cases, absolute, prohibitions on the rights of speech and association. Individually, the challenged order prohibits media resort to a number of important reportorial techniques that are essential to the full and accurate reporting of criminal trials. Collectively, the challenged order effectively imposes a blackout on all sources of information other than those obtained in the actual trial proceedings themselves.

Section One of the order prohibits "[e]xtrajudicial statements by participants in the trial . . . which *might* divulge prejudicial matter not of public record in the case . . . ." (emphasis added). By virtue of this broad restriction, all readily available sources of information – a broad category of persons, including witnesses and attorneys – were prohibited from discussing even such matters as the financial and legal implications of the indictment and its ramifications for the operation of the federal and state manpower programs.

Section Two of the order requires that all participants in the trial "avoid mingling with or being in the proximity of reporters, photographers, and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courthouse during recesses in the trial." By virtue of this restriction, reporters were barred from seeking explanatory sources of information during trial recesses, generally the only available times for approaching trial participants during the day. For reporters who work for daily newspapers or television and radio stations with daily and even hourly deadlines, this prohibition effectively denies them information they must collect at the time.

Section Three precludes the release of the names and addresses of prospective jurors "except on Order of Court." This section of the order thus precludes the press from exercising its traditional function of monitoring political, racial and other important characteristics of the prospective jury pool – characteristics that may be particularly important in a case with such substantial political overtones.

Finally, Section Four of the order provides that "[a]ll witnesses are prohibited from news interviews during the trial period." The necessity for this absolute proscription is far

from apparent in view of the censorial impact of Sections One and Two. Nevertheless, this section prevents the press from asking a witness anything, even the correct spelling of his name, the witness' occupation, or his address. It also prohibits the press from obtaining information from the witnesses – many of whom are public officials – which may have no relationship at all to the trial.

Individually, each restriction imposes a severe restraint on First Amendment freedoms and substantially restricts the reporting of this important trial. Some even have an impact that transcends this trial, inhibiting discussion of other issues by persons legitimately concerned with falling prey to the order's broad and ambiguous terms. Thus, even though some portions of the order may not explicitly impose restrictions on the publication of information, the cumulative impact of the web of restrictions is to create an almost total blackout on critical sources of information.

C. Procedural History of Case

This petition seeks review of the second ruling of the United States Court of Appeals for the Fourth Circuit in *Central South Carolina, et al. v. The Honorable Robert J. Martin, Jr., et al., supra* (attached as Appendix B hereto), which sustained an order restricting reporting of a criminal trial on the basis of the previous opinion of the United States District Court for the District of South Carolina (attached as Appendix C hereto).

On May 31, 1976, without providing notice or an opportunity for a hearing to trial participants or interested members of the media, the United States District Court for the District of South Carolina entered an order, *sua sponte*, restricting comment and reporting of the then-pending criminal trial in *United States v. J. Ralph Gasque, et al.* (the challenged order is attached as Appendix A hereto).[1] The order was entered "for reasons appearing to the Court." Those reasons were nowhere articulated, however.

Petitioners promptly sought and obtained a stay from the United States Court of Appeals for the Fourth Circuit, which indicated that their challenge to the restrictive order should be pursued by writ of mandamus. Accordingly, a writ of mandamus was filed in that Court. On

[1] The trial, then scheduled for June 21, 1976, was subsequently rescheduled for May 23, 1977. Following the Court of Appeals' decision and this Court's denial of petitioner's motion for stay, the trial began, and resulted in the conviction of defendant Gasque and the other defendants.

As the Court recognized in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47 (1976), this does not render the case moot. Like other cases of this kind, the issues here presented are "capable of repetition, yet evading review." *Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). As in *Nebraska Press Association*, a possibility remains that this conviction may be set aside on appeal or by collateral attack, thus possibly renewing the same issues in this very case. Moreover, it should be noted that the order challenged herein is virtually identical to a restrictive order entered by the same Court in *United States v. Addy*, Crim. No. 68/313 (D.S.C. May 8, 1969). Defendant Gasque also presently stands indicted for other, similar offenses. Petitioners therefore believe that this District Court or other judges of the United States District Court will enter similar orders in Senator Gasque's subsequent trial and in other more publicized criminal trials, as will other trial courts throughout the nation.

January 13, 1977, however, the Court of Appeals abandoned its earlier petition and ruled that mandamus was an inappropriate remedy for a challenge of this nature. *Central South Carolina Chapter, et al. v. United States District Court for the District of South Carolina,* 551 F. 2d 559 (4th Cir. 1977). The Court rejected petitioners' request that the case be considered as an appeal and refused to reach the merits of the case, suggesting instead that the claims should be pursued by original complaint in the District Court. The stay was dissolved at that time. This decision is not presented for this Court's review.

In accordance with the ruling of the Court of Appeals, on March 30, 1977, petitioners filed a complaint in the District Court, seeking a declaratory judgment and preliminary and permanent injunctions. The motion for preliminary injunction was never ruled upon. On May 3, 1977, however, the District Court dismissed the complaint, holding that petitioners lacked standing and, alternatively, that the challenged order was constitutional. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al., supra.* The District Court subsequently denied petitioners' motion for stay pending appeal.

Petitioners noted their appeal and sought a stay in the Court of Appeals. Petitioners also sought expedition of the appeal. On May 17, 1977, the Court substantially affirmed on the basis of the opinion of the District Court. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin Jr., et al.,* ____F.2d____, No. 77-1636 (4th Cir. May 17, 1977).

Initially, the Fourth Circuit curtly observed that "any inference in our previous opinion to the contrary notwithstanding," *but see* 551 F.2d at 561, it now believed that mandamus was the proper remedy. Treating petitioners' complaint and supporting submissions as a petition for mandamus, the Court reversed the District Court's determination that petitioners lacked standing. Curiously, however, the Court refrained from expressing an opinion regarding the propriety of the prohibitions on extrajudicial statements by the defendants, since the record did not reveal that those persons had objected to the restrictive order.

The Court of Appeals affirmed the District Court's order in all but minor respects "on the opinion of the district court." It did, however, limit the prohibition on "mingling" by confining the applicability of that prohibition to the courthouse itself. Likewise, the Court of Appeals limited the reach of the prohibition against photography and the sketching of jurors to the inside of the courthouse.[2]

Although substantially affirming the District Court's opinion, the Court of Appeals noted the "time honored" and customary nature of courtroom sketching and suggested that the District Court might reconsider its prohibition against juror sketching at trial.[3] Similarly, the Court of Appeals noted that certain parts of the District

---

[2]The District Court had constructed its order so as to make those prohibitions applicable in the courtroom, the courthouse and the adjacent grounds.

---

[3]At the request of other members of the media, the District Court subsequently agreed to permit the sketching of jurors at trial.

Court's order may prove unnecessary once a jury was empaneled. The Court therefore suggested that the District Court might reconsider portions of its order in the event the jury was sequestered.[4]

Thus, the Court of Appeals' ruling adopted the District Court's conclusion that restrictive orders of this kind can be imposed prior to trial and thereafter sustained throughout the trial if there is a "reasonable likelihood that prejudicial news prior to trial will jeopardize the defendants' right to a fair trial." *Central South Carolina Chapter, et al., supra,* 431 F. Supp. at 1188.[5] Petitioners' motion for stay pending the filing and disposition of this petition was thereafter denied.[6]

---

[4]Petitioners had urged both the District Court and the Court of Appeals that the restrictive order was not necessary, since juror sequestration offered a preferable manner for protecting the defendants' Sixth Amendment rights. That argument was rejected by the District Court, however.

Following the Court of Appeals' decision and the District Court's selection and sequestration of a jury, counsel for petitioners wrote the District Court to request that, in view of the protection afforded by the juror sequestration, the restrictive order be vacated. (Counsel's letter is included as Appendix D, hereto.) That request elicited no formal response, and the Court indicated that the restrictive order would remain in force during the trial.

---

[5]The District Court nevertheless concluded that it perceived a "substantial likelihood" of such a possibility when it entered the order. *Central South Carolina Chapter, Society of Professional Journalists, et al. v. The Honorable J. Robert Martin, Jr., et al.,* 431 F. Supp. 1182, 1188, n.5 (D.S.C. 1977).

---

[6]Justices Brennan and Marshall voted to grant the stay.

II. THE "REASONABLE LIKELIHOOD OF THREAT TO A FAIR TRIAL" STANDARD APPLIED TO JUSTIFY SWEEPING OR ABSOLUTE PROHIBITIONS ON SPEECH AND ASSOCIATION REFLECTS AN INADEQUATE RECOGNITION OF THE FIRST AMENDMENT INTERESTS AT STAKE AND THE ALTERNATIVE MEASURES FOR INSURING A FAIR TRIAL, AND SHOULD BE REJECTED.

A. The Total Impact of the Challenged Order Is Substantially the Same as a Prior Restraint.

Preliminarily, it should be recognized that the cumulative impact of the challenged order – the focus of the prior restraint analysis identified by the Court in *Nebraska Press Association v. Stuart, see* 427 U.S. at 559 – is to impose sweeping and pervasive restrictions on the media's ability to report matters related to this criminal trial fully and fairly. As a practical matter, the order restricts reporting of the criminal trial to a report only of those matters that transpire in open court. The order prohibits media resort to any number of common reportorial techniques designed to assure the accuracy of the reporting of matters that transpire in open court, and to provide the additional information that often is necessary for a thorough understanding of the significance of those events.

---

[7]The challenged ban on courtroom sketching of jurors applied directly to the media and constituted a classic prior restraint. Jurors sitting in a public trial are part of the "public property" of the occurrences of open court. *Craig v. Harney,* 331 U.S. 367 (1947). Thus the media is free to report those matters, *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975), and one of the commonly recognized techniques of that reporting is by providing sketches that portray the jury's role in the trial. Possible juror distraction, cited

(continued)

As Judge Craven previously recognized in his concurring and dissenting opinion in the initial mandamus proceeding in this case, the prohibition against news interviews can only fairly be said to apply directly to the media. *Central South Carolina Chapter, et al. v. United States District Court for the District of South Carolina, supra,* 551 F.2d at 566, n.2. The same applies to the "mingling" prohibition. Moreover, viewed in its totality, the order challenged herein "freezes" information just as surely as would an order prohibiting publication of information already obtained; the impact is equally "immediate and irreversible." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 559.

Relying substantially on the dictum in this Court's opinion in *Sheppard v. Maxwell,* 384 U.S. 333 (1966), the Courts in this case condluded that such sweeping restrictions – including absolute *per se* prohibitions on "mingling" with the press and witness interviews during the trial period – could be sustained if there was a generalized finding of a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *Central South Carolina*

---

[7](continued)

by the District Court in justification for its sketch ban, can be dealt with by assuring that any sketch artist perform that function in an unobtrusive manner. In addition, the District Court's subjective impressions of the threats posed by juror sketching are not sufficient to support this prior restraint on First Amendment rights, especially when viewed in light of the Court's own concession that it has found similar bans unnecessary in other cases. Similarly, the Court's denial of access to the jury list failed to recognize that under 28 U.S.C. § 1866 (a) the list of prospective jurors must consist of names "publicly draw[n]," and thus is information in the public domain. *Cf. Cox Broadcasting Co. v. Cohn, supra.*

Chapter, et al. v. The Honorable J. Robert Martin, Jr., et al., supra, 431 F. Supp. 1188.[8] Thus, the Fourth Circuit cast its vote with that of the Tenth Circuit in requiring a scant finding of a reasonable likelihood of a threat to a fair trial in order to justify sweeping, and in some cases absolute, prohibitions on the full reporting of criminal trials.

B. The Lower Courts Are in Plain Conflict as to the Constitutional Standards To Be Applied in These Cases.

The Courts of Appeals are in hopeless disarray in articulating the basic constitutional standard by which restrictive orders of this kind are to be judged. For example, in *United States v. Tijerina,* 412 F.2d 661, 666 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969), the Tenth Circuit concluded that a reasonable likelihood of prejudicial news which could make the empanelment of an impartial jury more difficult and thus tend to prevent a fair trial suffices to support the entry of such orders. The Sixth and Seventh Circuits, on the other hand, apply a more demanding standard. The Seventh Circuit held in *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242 (7th Cir. 1974), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers,* 427 U.S. 912 (1976), that blanket prohibitions of this kind cannot stand. Instead, the Seventh Circuit concluded, bans on comment can only be imposed when "the particular statement posed a serious

---

[8]Since the Court of Appeals' decision was explicitly based on the opinion of the District Court, *Central South Carolina Chapter, et al., supra,* ____ F.2d ____, petitioners rely on the District Court's opinion in identifying the basic rationale and the standards that now govern in the Fourth Circuit.

and imminent threat of interference with a fair trial." *Id.* at 251. Similarly, the Sixth Circuit concluded in *CBS, Inc. v. Young,* 522 F.2d 234, 241 (6th Cir. 1975), that "serious and imminent threats to the fairness and integrity of the trial" must be found in order to justify restraints similar to those sustained in this case.

C. The "Reasonable Likelihood" Standard Affords Insufficient Recognition to the Strong First Amendment Protections Against Restraints on the Press.

Any consideration of this issue must proceed from the recognition of the media's role as the "handmaiden of et

Court, including its most recent opinion in *Nebraska Press Association v. Stuart,* 427 U.S. 539, (1976), have emphasized the critical importance of open and public trials, and the role of the press in assuring and enhancing that right. *See, e.g., Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491-92 (1975); *Times-Picayune Publishing Corp. v. Schulingkamp,* 419 U.S. 1305, 1307-08 (1974) (Chambers Opinion of Powell, J.); *Sheppard v. Maxwell, supra,* 384 U.S. at 349-50; *Estes v. Texas,* 381 U.S. 532, 541 (1965); *Craig v. Harney,* 331 U.S. 367, 374 (1947). In this case, the importance of full and accurate reporting of this trial was heightened by the allegations of abuse of the public trust directed both against defendant Gasque and, by the defendant, against the prosecution as well.[9] These issues assume a vastly

[9]Defendant Gasque, who for many years was a State Senator, was indicted on charges of misuse of federal manpower funds, and other, related offenses. He was not re-elected following the indictment. Gasque contended that the indictment was "politically motivated."

greater public significance, for they go to the very heart of our political and judicial systems.

Public officials occupy a unique position in our society. Their position in the public trust elicits substantially greater public interest in being fully informed as to their affairs, even those that may not strictly relate to the public office they occupy. *See, e.g., Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 344-45 (1974). Thus, the Supreme Court has repeatedly emphasized that the First Amendment responsibilities of the press are especially important when reporting about elected public officials, such as Senator Gasque; public programs, such as the local and federal manpower programs in South Carolina, which were implicated by the charges against Gasque; and the public prosecutor's exercise of his power and duties. As the Fifth Circuit noted in a similar context in *United States v. Dickinson,* 465 F. 2d 496 (5th Cir. 1972):

> "The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. Therefore, 'particularly in matters of local political corruption and investigation it is important that freedom of communications be kept open.'" *Id.* at 501, quoting *Wood v. Georgia,* 370 U.S. 375, (1962).

See also, Comment, *Prejudicial Publicity in Trials of Public Officials,* 85 Yale LJ. 123 (1975).

Petitioners by no means suggest that persons who enter public service sacrifice their constitutional right to a fair trial. It is clear, however, that in trials involving public officials, the public's right to be informed, and the media's corresponding right to information essential to the full and accurate reporting of those matters, is substantially greater. In such cases, the normal importance of the press as the "handmaiden of effective judicial administration," *Sheppard v. Maxwell, supra,* 384 U.S. at 350, is complemented by the critical importance of the press in bringing to the public the full panoply of facts relevant to the public's assessment of its public officials.

Cases of this kind present issues that go to the very core of First Amendment values. The burden on those seeking to restrain or inhibit full reporting of these proceedings and their attendant facts therefore must be substantially greater. The necessity of clearly demonstrating, by reference to concrete evidence of record, that the criminal defendants' right to a fair trial cannot be assured by alternative measures that do not inhibit the free flow of this critical information is at its zenith.

Neither *Sheppard* nor the relatively few cases dealing with questions of access to newsworthy events, *see, e.g., Branzburg v. Hayes,* 408 U.S. 665 (1972); *Pell v. Procunier,* 417 U.S. 817 (1974); *Saxbe v. Washington Post,* 417 U.S. 843 (1974), support the Fourth Circuit's conclusion in this case. For example, the Court's interpretation of *Sheppard* is by no means supported by that decision and is inconsistent with the emphasis placed in *Nebraska Press Association* on the many preferable alternatives short of restrictions on the full and accurate reporting of criminal trials.

An examination of *Sheppard* reveals that the "reasonable likelihood" standard set forth in that opinion related to transfer and continuance – alternatives that fall short of the sweeping abridgement of First Amendment rights imposed in this case. *See Sheppard v. Maxwell, supra,* 384 U.S. at 362. Although the Court noted in passing that trial participants should not be allowed to frustrate the judicial function, *id.*, its specific articulation of the standard governing restrictions on comment by those persons stated, "the trial court might well have proscribed extrajudicial statements *which divulged prejudicial matters.*" *Id.* at 361 (emphasis added). Similarly, the "Free Press-Fair Trial" standards of the Committee on the Operation of the Jury System cannot be relied upon to expand the *Sheppard* standard beyond its own boundaries. The ultimate standard is set by the Constitution.

The *Sheppard* statement that proscriptions against trial participants' comment be aimed at those statements that divulge prejudicial matters therefore supports petitioners' contention that these sweeping abridgments of their First Amendment rights of the nature here considered be assessed by the rigorous standards traditionally applied to prior restraints. The traditional "compelling interest" required in justification of abridgements of First Amendment rights cannot be satisfied by a "reasonable likelihood" of threat to a fair trial. That standard is too lax and amorphous. It points more toward speculation than toward the kinds of concrete harm that should be required to justify these infringements on First Amendment rights. Thus, the Court should endorse the decisions of the Sixth and Seventh Circuits in *CBS, Inc. v. Young, supra,* and *Chicago Council of Lawyers, supra,* and require that such orders can be entered only in response to a serious and imminent threat to a fair trial.

Additionally, regardless of the precise articulation of the standard identifying the threat to Sixth Amendment rights that must be required, all such orders must be carefully scrutinized to determine whether alternative measures falling short of such serious infringements of the First Amendment would suffice to address possible prejudice to a fair trial.[10] Absent such an inquiry, restrictions on First Amendment freedoms may be imposed unnecessarily. Finally, of course, any restrictive order that might be justified under the above criteria can be no broader than is necessary to deal with the evil to which it is addressed.

III. THE RECORD IN THIS CASE WILL NOT SUPPORT THE ENTRY OF THE CHALLENGED ORDER EVEN UNDER THE LAX "REASONABLE LIKELIHOOD" STANDARD ADOPTED BY THE DISTRICT COURT AND THE COURT OF APPEALS.

Even assuming the "reasonable likelihood" standard to be constitutionally acceptable, the record in this case will not support the entry of the challenged order. An examination of the stories published prior to the District Court's order does indicate that this case received considerable media attention. The record is barren of support for the District Court's contention that media coverage evinced a substantial or even reasonable likelihood of

[10]This requirement reflects the Court's repeated insistence that the government must employ alternatives that do not infringe on First Amendment rights whenever possible. *See, e.g., Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

jeopardizing defendants' right to a fair trial, however.[11] Moreover, the prohibitions against "mingling" with the media and witness interviews are *absolute* prohibitions, not even qualified by the "reasonable likelihood" standard the District Court purported to apply.

The issues at stake in *United States v. J. Ralph Gasque, et al.* are not the kind that arouse great public passion or prejudice. Compare *Nebraska Press Association v. Stuart, supra; Times-Picayune Publishing Corp. v. Schulingkamp, supra; Sheppard v. Maxwell, supra.* The public awareness of and interest in this matter notwithstanding, the record contained no suggestion that the trial would be converted into a circus or carnival affair. Compare *Estes v. Texas,* 381 U.S. 532 (1965); *Sheppard v. Maxwell, supra.* Also absent from this case are media publications of confessions or other highly emotional statements that reach the ultimate issues to be resolved at trial. Compare *Nebraska Press Association v. Stuart, supra; Rideau v. Louisiana,* 373 U.S. 723 (1963). In sum, there was no suggestion in this case that full media coverage had or would create a "trial atmosphere that [would be] utterly corrupted by press coverage." *Murphy v. Florida,* 421 U.S. 794, 798 (1974). The Court's resctrive order was thus a severe overreaction to virtually a non-issue of prejudicial pretrial publicity.

A careful examination of the District Court's opinion indicates that its determination that the perceived "sub-

[11]Petitioners included as an appendix to their Complaint in the District Court a compilation of all of the published stories relating to the trial that had appeared prior to the issuance of the challenged order. Thus, the record affords the Court the opportunity to assess for itself the basis on which the District Court and the Court of Appeals concluded that the threat to a fair trial was sufficient to support the entry of the challenged order.

stantial likelihood" of a threat to a fair trial that purportedly justified the challenged order reflected its concern that the body of published information, particularly that denominated by the Court as "prejudicial," was widely disseminated and had the effect of "making more difficult the selection of an impartial jury."[12]

Restrictions on the full and accurate reporting of a public criminal trial of this importance surely cannot be justified on the simple conclusion that publicity would make the empanelment of an impartial jury "more difficult." By that standard, virtually any pretrial publicity in any case would support the entry of restrictions of the nature challenged in this case. Neither *Sheppard v. Maxwell, supra,* nor any other decisions of this Court, nor the recommendations of the Kaufman Committee for dealing with the "Free Press-Fair Trial" issue endorse or

---

[12]To the extent that the Court's assessment of this issue rested on its assumption that the exposure of potential jurors to possibly prejudicial information that might not subsequently be admissible at trial necessarily would render a fair trial impossible, *see Central South Carolina Chapter, et al. v. The Honorable J. Robert Martin, Jr., et al., supra,* 431 F. Supp. 1188 n. 4, it was in error. That is not the test. Rather, the governing standard is whether, in light of the prospective juror's knowledge and attitudes, that person can render a fair and impartial verdict based on the evidence adduced at trial. Experience demonstrates that such measures as careful *voir dire* can assure the defendant's right to a fair trial even in cases where pretrial publicity has been extensive. "Taken together, the cases demonstrate that pretrial publicity – even pervasive, adverse publicity – does not inevitably lead to an unfair trial." *Nebraska Press Association v. Stuart, supra,* 427 U.S. at 554. *See also Dobbert v. Florida,* 45 U.S. L.W. 4721, 4726-27 (U.S. June 17, 1977); *Murphy v. Florida,* 421 U.S. 794 (1974); *Stroble v. California,* 343 U.S. 181 (1952).

allow the entry of sweeping, and in some cases absolute, restrictions on First Amendment freedoms on so scant a perception of threat to a fair trial.

Finally, even assuming the record might justify some of the restrictions imposed in this case for the purpose of facilitating the empaneiment of an impartial jury, that justification cannot be asserted in support of the continuation of the challenged order after the jury has been selected. The District Court's concern that jurors would be exposed to prejudicial information not made a part of the record at trial clearly can be dealt with by measures short of such sweeping abridgements on First Amendment freedoms. The jury can, for example, be instructed to avoid contact with news stories relating to the trial. If the threat is more severe, the jury can and should be sequestered during the period of trial.

An examination of the District Court's opinion indicates that that Court did not even consider these alternatives, however. Thus, even taking the District Court's belated rationalizations at face value, it is clear that the record and the opinion below fail to provide any justification for continuing the challenged restrictions on comment, news interviews, or "mingling" after the jury has been empaneled.[13]

---

[13]The Court did indicate that sequestration of prospective jurors prior to the empanelment of a jury would be impractical. *Central South Carolina, et al. v. The Honorable J. Robert Martin Jr., et al., supra,* 431 F. Supp. at 1189, n.6. At no point, however, did the Court suggest that it considered this or other restrictions on juror conduct after the jury was selected as a means of striking the appropriate balance between the First and Sixth Amendments.

(continued)

By any label, it must be recognized that the limitations imposed on newsgathering and the full and accurate reporting of this matter are substantial. Such restrictions must be based on justifiable grounds, and must be no broader than necessary to avert the evils that necessitate the abridgement of First Amendment right. The First Amendment still requires that such restraints on First Amendment freedoms be justified by a "compelling interest." *See, e.g., NAACP v. Button,* 371 U.S. 415, 419 (1963); *Sheppard* does not alter or diminish this basic requirement. No such "compelling interest," no matter how articulated in terms of reasonable or substantial likelihood of threat to a fair trial, can be supported on the record of this case in view of the many alternatives for dealing with the threat of prejudice by means other than abridgments of First Amendment rights.

IV. THE CHALLENGED ORDER SUFFERS FROM FATAL DEFECTS OF VAGUENESS AND OVERBREADTH.

Even assuming that a constitutionally adequate basis for the entry of some restrictions could be demonstrated, any such restrictions would still be subject to other standards traditionally applied in First Amendment cases.

---

[13](continued)

This was noted by petitioners in the District Court and the Court of Appeals, prompting the Court of Appeals lamely to note that the District Court might reconsider the necessity for the challenged order. Subsequently, even though a jury had been chosen and sequestered, the District Court refused petitioners' request that the order be dissolved, and it remained in effect throughout the trial.

For example, the order must be narrowly tailored to the perceived evils that justify its imposition; it is not. The order likewise must be free of vagueness; it is not. Instead, the challenged order is both vague and overbroad.

The order is overbroad in that it prohibits conduct that could not reasonably be deemed to represent a threat to the defendants' right to a fair trial or to the integrity of the Court. *See, e.g., Chicago Council of Lawyers v. Bauer, supra; CBS Inc. v. Young, supra; United States v. CBS, Inc.,* 497 F.2d 102 (5th Cir. 1974); *Dorfman v. Meiszner,* 430 F.2d 558 (7th Cir. 1970). For example, the "mingling" prohibition is unnecessary in light of the restrictions on comment. Indeed, the impact of the challenged order is broader even than the issues at stake in this trial. As one affidavit of record indicates, this order has inhibited discussion of other public issues that are unrelated to this trial.

Similarly, terms such as "mingling" and the "environs of the court" are nowhere defined in the order and defy easy understanding or interpretation. The vagueness challenge must be resolved solely be reference to the order on its face. Subsequent "judicial gloss" or offers to confer to clarify vague portions of the order cannot now be set forth to salvage it from its inherent vagueness. Other inherently vague terms, such as "being in the proximity of reporters, photographers and others," are nowhere defined, not even at this late date.

V. ORDERS OF THIS KIND CAN BE ENTERED ONLY IN ACCORDANCE WITH PROCEDURAL SAFEGUARDS MANDATED BY THE DUE PROCESS CLAUSE OR THE COURT'S SUPERVISORY POWERS.

The challenged order was entered without notice and an opportunity for prior hearing to petitioners and other interested parties. Petitioners' First Amendment rights are plainly a "liberty" interest within the Fifth Amendment, see *Board of Regents v. Roth*, 408 U.S. 564 (1972), and thus cannot be abrogated without prior notice and an opportunity for a hearing. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968); *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). And, even if this Court were reluctant to constitutionalize this requirement through the Due Process Clause, a hearing should nevertheless be required as a matter of fundamental fairness and in the exercise of the Court's supervisory powers, as the Court of Appeals for the Third Circuit recognized in *Schiavo v. United States*, 504 F.2d 1 (3d Cir. 1974) (*en banc*), *cert. denied sub nom. Ditter v. Philadelphia Newspapers, Inc.*, 419 U.S. 1096 (1975).

Restrictive orders of this kind frequently generate litigation in which "time is of the essence" in the appellate court's resolution of the issues. *See, e.g., Nebraska Press Association v. Stuart*, 423 U.S. 1327, 1329 (Chambers opinion of Blackmun, J.). Invariably, reviewing courts are asked to rule on the adequacy of the justifications that prompted the entry of the challenged order, as well as on whether the challenged order is no broader than necessary to respond to the perceived threats that prompted its entry. Invariably, the resolution of these issues requires that reviewing courts make difficult and sensitive

judgments regarding the appropriate balance between the defendants' Sixth Amendment right to a fair trial and the First Amendment protections for the public's right to be adequately informed about the workings of the criminal justice system.

Certainly the history of this case evinces the need that orders of this kind be preceded by a hearing at which interested parties be afforded the opportunity to comment on the need for such restrictions as well as on the terms of any restrictions that might, of necessity, be entered. Here the order was entered *sua sponte*, without any notice to interested parties. The order was entered "for reasons appearing to the Court," which were nowhere specified in the opinion and were not articulated by the entering court until months later, in response to petitioners' action filed in the District Court. This is hardly a procedure that is conducive to the prompt and responsible resolution of the difficult constitutional issues produced by cases of this nature. Thus, if the Court should determine that the Due Process Clause does not constitutionally compel the procedures urged herein, it should endorse the conclusion of the Third Circuit and require that United States District Courts afford such procedural safeguards through the exercise of its supervisory powers over the lower federal courts.

CONCLUSION

For the reasons articulated herein, petitioners respectfully suggest that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

MITCHELL ROGOVIN
DAVID BOYD

Rogovin, Stern & Huge
1730 Rhode Island Ave., N.W.
Washington, D.C.

JAMES C. HARRISON, JR.
COSTA M. PLEICONES

Harrison & Pleicones
1010 Barringer Bldg.
Columbia, South Carolina

JACK C. LANDAU

Reporters Committee
For Freedom of the Press
1750 Pennsylvania Ave., N.W.
Washington, D.C.

APPENDIX A

ENTIRE TEXT OF ORDER ENTERED IN *UNITED STATES v. J. RALPH GASQUE, ET AL.*, ON MAY 31, 1976

"For reasons appearing to the Court, it is Ordered that the above case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further Ordered that

"(1) Extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

"(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during recesses in the trial.

"(3) The names and addresses of prospective jurors are not to be released except on Order of Court, and no photograph shall be taken and no sketch made of any juror within the environs of the Court.

"(4) All witnesses are prohibited from news interviews during the trial period.

"(5) The United States Marshal at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.

(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

* * *

The United States Court of Appeals modified paragraph two by rendering it inapplicable to "the sidewalks adjacent thereto" and limited pragraph three by defining "environs of the Court" to mean only the inside of the courthouse, not the adjacent grounds. *See Central South Carolina Chapter, et al. v. The Honorable J. Robert Martin, Jr., et al.*, ____F.2d____, No. 77-1636 (4th Cir. May 17, 1977).

APPENDIX B
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 77-1636

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; FRED P. McNEESE, ROBERT McALISTER, ROBERT HITT, individually as news reporters and as members, officers, and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION; DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION; THE ENTERPRISE, INC.; EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS

Appellants

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; MARK W. BUYCK, JR., Esq., United States Attorney for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshall for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina

Appellees

Appeal from the United States District Court for the District of South Carolina, at Florence. J. Robert Martin, Jr., District Judge.

Submitted May 16, 1977 Decided May 17, 1977

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Mitchell Rogovin, George T. Frampton, Jr., Joel I. Klein, David R. Boyd, James C. Harrison, Jr., Costa M. Pleicones, Jack C. Landau, for Appellants; Thomas E. Lydon, Jr., United States Attorney, Wistar D. Stuckey, Assistant United States Attorney, Glen E. Craig, Assistant United States Attorney, Lu Jachnycky, Attorney, Department of Justice, for Appellees.

WIDENER, Circuit Judge:

This matter came before the district court on a complaint seeking declaratory and injunctive relief against the district court's order of May 31, 1976, and on a motion for a stay of that order pending appeal. The challenged order, reproduced below,[1] establishes certain restrictions upon extrajudicial statements and actions of participants in the pending criminal trial of J. Ralph Gasque in the United States District Court for the District of South Carolina.

---

[1] The order reads in pertinent part as follows:

"For reasons appearing to the Court, it is Ordered that the above case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further Ordered that

(continued)

United States District Court for the District of South Carolina.

The complaint was dismissed by the district court by order dated May 2, 1977, and is now before us on appeal. The district court also denied plaintiffs' motion for a stay

---

[1](continued)

"(1) Extrajudicial statements by participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.

"(2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during recesses in the trial.

"(3) The names and addresses of prospective jurors are not to be released except on Order of Court, and no photograph shall be taken and no sketch made of any juror within the environs of the Court.

"(4) All witnesses are prohibited from news interviews during the trial period.

"(5) The United States Marshall at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,

(a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.
(b) Allocation of seats to the news media representatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

The Society did not contest the validity of section five of the order.

The first appeal in this matter is reported as F2 (4th Cir. 1977).

pending appeal by order of May 10, 1977. That motion is renewed here pursuant to Rule 8 of the Federal Rules of Appellate Procedure.

We believe that mandamus is the proper remedy to request the relief prayed for here, any inference in our previous opinion to the contrary notwithstanding. See Note: *Ungagging the Press,* 65 Georgetown Law Review 81, for a collection of some decisions on the subject.

The plaintiffs having substantially complied with the requirements of Rule 21(a), Fed. R. App. P., we think the complaint and supporting submissions should be treated as a petition for mandamus, and we so treat them. As this implies, we think plaintiffs have standing to seek issuance of the writ. Notwithstanding that petitioners desire for access to sources of information may be a broadly based concern, shared by the public at large, if petitioners can show an injury "to [themselves] that is likely to be redressed by a favorable decision," *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976), if they have alleged a sufficient "personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204 (1962), the constitutional requirement of standing is satisfied. We think these tests are met here. We do not regard as wholly speculative the relationship between the district court's order and the plaintiffs' difficulties in seeking to perform their reportorial functions. See *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976).

Considering the papers before us as a petition for mandamus, and having carefully considered the submissions of the parties, we accordingly hold:

The district court's order of May 2, 1977 dismissing the complaint is in all respects affirmed, on the opinion of the district court, F.Supp. (D.S.C. 1977), as that opinion addresses the merits of the controversy, subject to the following qualifications:

1. To the extent that the district court's order may be construed to prohibit extrajudicial statements concerning the trial on the part of the defendant, Gasque,[2] we express no opinion as to its propriety, since the defendant has not objected to the order in any respect. Any rights of Gasque not waived are reserved.

2. In paragraph 2 of the May 31st order, we regard the prohibition on mingling upon the sidewalks adjacent to the courthouse as overly broad. The district court will lift its prohibition on mingling as it applies to adjacent sidewalks.

3. With respect to the prohibition in paragraph 3 of the said order upon the sketching of jurors within the environs of the court, we recognize that courtroom sketching is a time-honored custom in many communities and many courts. The district judge has indicated that any particular aspect of the order is open to reconsideration during the trial, and, viewing the prohibition in that light, we assume that it will be reconsidered upon request if fears of juror distraction prove unfounded.

4. Also in paragraph 3, we construe the "environs" of the United States District Court in Columbia, South Carolina as meaning inside the courthouse.

---

[2] Gasque, as we use the word, refers to any or all defendants.

5. Once a jury is empaneled at the inception of the trial, the district court may find that parts of the May 31st order are no longer necessary to ensure a fair trial or juror impartiality. If, for example, the jury were sequestered, access of the press to trial participants may no longer pose the same threat to the conduct of a fair trial. We leave this matter to the district court in the first instance, believing that our intervention at this point would be premature.

Since the petition for mandamus is in all but minor respects denied on the merits, it follows that petitioners' motion for a stay pending appeal to this court is likewise denied.

The mandate will issue forthwith because the criminal trial is due to commence May 23, 1977.[3]

---

[3] The parties have requested that we dispose of this appeal as soon as possible and filed briefs. The government has waived oral argument, but the plaintiffs have indicated a desire for it. In order to dispose of the case at once, we have decided the case on the briefs and the record.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

CENTRAL SOUTH CAROLINA CHAPTER, SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI: ROBERT HITT, individually as news reporters and as members, officers and directors of the Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi; SOUTH CAROLINA BROADCASTERS ASSOCIATION: DR. RICHARD URAY, individually and as Executive Manager of the South Carolina Broadcasters Association; SOUTH CAROLINA PRESS ASSOCIATION: THE ENTERPRISE, INC.: EDWARD M. SWEATT, individually as President of the South Carolina Press Association and as a shareholder and member of the Board of Directors of The Enterprise, Inc.; and CAROLYN KAY HARRIS,

Plaintiffs,

Civil Action No. 77-575

v.

THE HONORABLE J. ROBERT MARTIN, JR., United States District Court for the District of South Carolina; J. ELLIOTT WILLIAMS, United States Marshal for the District of South Carolina; and MILLER C. FOSTER, JR., United States Clerk for the District of South Carolina.

Defendants.

[Filed May 2, 1977]

ORDER

This matter is before the Court upon the above captioned parties[1] cross-motions for summary judgment upon the pleadings pursuant to a complaint for injunctive and declaratory relief seeking to void an order issued by this Court on May 31, 1976 in the criminal case of *United States v. J. Ralph Gasque, et al.*, No. 76-104. The plaintiffs, with the exception of one who is a newspaper subscriber, are newsmen, journalists and news media establishments. The order issued May 31st reads as follows:

> "For reasons appearing to the Court it is Ordered that the above captioned case is scheduled for trial in the United States District Courtroom, Columbia, South Carolina, on June 21, 1976. It is further ordered that
>
> (1) Extra judicial statements by trial participants in the trial, including lawyers, parties, witnesses, jurors and court officials, which might divulge prejudicial matter not of public record in the case are prohibited.
>
> (2) All participants in the trial, including lawyers, parties, witnesses, jurors and other officials shall avoid mingling with or being in the proximity of reporters, photographers and others in the entrances to and the hallways in the courthouse building, including the sidewalks adjacent thereto, both in entering and leaving the courtroom and the courthouse during the recesses in the trial.

[1] Although the plaintiffs have named this Court as a party defendant in the captioning of this action, this Court will address the claims raised in the complaint in light of the possible collateral consequences a determination may have on the pending criminal case before this Court which is the subject of the May 31st order now under attack and in light of the unique posture of these cases.

> (3) The names and addresses of prospective jurors are not to be released except on Order of the Court, and no photographs shall be taken and no sketch made of any juror within the environs of the Court.
>
> (4) All witnesses are prohibited from news interviews during the trial period.
>
> (5) The United States Marshal at the direction of the Court will allocate seating of spectators and representatives of the news media, provided, however,
>
> (a) No member of the public or news media representative shall be permitted at any time within the bar railing, except to specific seats designated for their use.
>
> (b) Allocation of seats to the news media represenatives, if there be an excess of requests, will take into account any pooling arrangement that may be agreeable among the newsmen."

The plaintiffs do not contest the validity of section five of the May 31st order in this action. They do, however, contest the remaining portions of the order and contend that it constitutes a prior restraint on freedom of the press in violation of their First Amendment rights accorded by the United States Constitution. As the basis of their contentions, the plaintiffs assert that the order has effectively destroyed the right of the press to print the news by destroying its right to gather news from important sources, a right they contend is necessarily a First Amendment corollary to the right to report public proceedings and the conduct of public officials. Additionally, the plaintiffs contend that the order was issued in violation of their constitutional due process right to be served notice and to be heard prior to its issuance and that the order suffers from vagueness and overbreadth.

The claims asserted by the plaintiffs are new to this Court only in the sense that this is the first and only proceeding before this Court to which it may properly address the same. Prior to the instant action, the identical plaintiffs had instituted an appeal or in the alternative a petition for a writ of mandamus attacking the provisions of the May 31st order in the United States Court of Appeals for the Fourth Circuit. As it was apparent to that Court that the complainants were not parties to the criminal proceedings against J. Ralph Gasque and his codefendants and that their right to relief from the order was far from clear and indisputable, it dismissed the appeal and denied, in the alternative, the petition for mandamus. A stay order which had been previously issued against the criminal case by the Court of Appeals was dissolved as well. *Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi, et.al. v. United States District Court for the District of South Carolina, et.al.,* F.2d (4 Cir. 1-13-77).

The plaintiffs now seek independent recourse against the provisions of the May 31st order, apart from the proceedings of the criminal case, by way of a motion to stay or preliminary injunction of the order and by way of permanent injunctive and declaratory relief against the same. That complaint was served on the interested parties named as defendants and an answer and memorandum has since been submitted by the United States District Attorney for the District of South Carolina. The answer, entitled motion to dismiss pursuant to Rule 12(b), F.R.Civ.P. or in the alternative, motion for summary judgment pursuant to Rule 56, F.R.Civ.P. was filed on behalf of the named defendants, Williams, Foster and on behalf of Thomas Lydon, who recently succeeded Mark Buyck as the District Attorney for the District of South Carolina. In reply, the plaintiffs have

filed a pleading and memorandum entitled opposition to motion to dismiss and cross-motion for summary judgment. The plaintiff also requested in that pleading that this Court enter a final order as promptly as possible in recognition of the urgency of the issues raised in the complaint.

It is immediately recognized and agreed to by the parties that there are no disputed facts and that the issues raised and joined by the pleadings, affidavits and exhibits attached thereto and the previous proceedings before the Court of Appeals are purely legal questions and that the motion for a stay or preliminary injunction may be determined by this Court in absence of an evidentiary hearing without prejudice to any of the interests involved.[2] It is also apparent that the action for permanent injunctive and declaratory relief should be advanced and expedited in order that a final determination in this matter be made with some urgency. The issues raised thereto are also without factual dispute or controversy and are purely legal questions so as to support the consolidation of this action for a final determination in the absence of a hearing without prejudice to any of the interests involved and as agreeable by the parties. Accordingly, the remainder of this order will be devoted to the merits of the claims raised that the May 31st order con-

---

[2] The plaintiffs had earlier submitted a letter to this Court requesting an evidentiary hearing upon the motion for a stay or preliminary injunction. The government's answer to the complaint followed shortly thereafter and contended that there was no necessity for a hearing as the matters raised and joined by the pleadings were purely legal questions. Therefore, this Court found it appropriate to issue an order on April 19, 1977 requiring an expedited reply from the plaintiffs including pleadings, if any, which would support a showing of the necessity for a hearing. As indicated the plaintiffs have agreed the matters raised may be resolved without a hearing.

stitutes a prior restraint against the press in violation of the First Amendment and that the order was issued in violation of the plaintiffs' Fifth Amendment due process rights to notice and a hearing and that the order suffers from vagueness and overbreadth.

There first appears to be a serious question of standing for the plaintiffs to assert this action. The concept of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The standing question is whether the plaintiff has alleged such a personal stake in the outcome of the controversy to warrant *his* invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf. The relevant inquiry, assuming justiciability of the claim, is whether the plaintiff has shown injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Article III limitation of the Constitution. *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 US 26 (1976). The concept of standing has also been said to focus upon the inquiry whether "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by statute or constitutional guarantee in question" *Data Processing Service v. Camp,* 397 US 150 (1970); *C.B.S. v. Young,* 522 F.2d 234 (7 Cir.1975).

Turning to the latter concept of standing first, it is immediately recognized that this is not a case of direct restraint upon the right of the public or the press to publish or speak what it knows, but is rather a restraint upon trial participants in a criminal case (none of which are plaintiffs in this

civil action) to prohibit the trial participants from divulging extrajudicial prejudicial matters not of public record in the pending criminal case. The plaintiffs contend that such a restraint destroys its right to publish news by destroying its right to gather news. They argue that the right to gather news is a necessary First Amendment corollary to the right to publish and report public proceedings or in other words, that the interest in gathering news is within the zone of interests to be protected by the constitutional right to publish and speak.

While *C.B.S. v. Young* (supra) would appear to stand for the proposition that the news media have standing to assert a claim that restraints on trial participants in a civil case deny access to potential sources of information and therefore deny members of the press their constitutional right to gather news, this Court would find the case of questionable authority. *C.B.S.* relies on dicta from *Branzburg v. Hayes,* 408 US 665 (1972) that newsgathering is not without some First Amendment protection, thus the conclusion that the news media has standing to assert the claim that any news gathering restraints raise constitutional First Amendment issues. However, *Branzburg* also indicated that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally, citing *Zemel v. Rusk,* 381 US 1 (1965) or stated differently that the right to speak and publish guaranteed by the First Amendment does not carry with it the unrestrained right to gather information. *Branzburg* also cited with approval *Sheppard v. Maxwell,* 384 US 333 (1966) wherein it was stated that "a trial court might well have proscribed extrajudicial statements by any lawyer, party, witness or court official which divulged prejudicial information."

Most courts have addressed the question of the news media's right of access to particular information in terms of equal protection, finding that if the public has a right to certain information then the press, which has no greater or lesser right is also entitled to the information. *Pell v. Procunier,* 411 US 817 (1974); *Saxbe v. Washington Post Co.,* 417 US 843 (1974), see also Judge Winter's dissent, *US v. Steelhammer,* F.2d , (4 Cir.8-22-76). This Court believes in light of *Branzburg, Zemel, Sheppard, Pell* and *Saxbe* that any right to particular information apart from equal protection considerations is factually limited to information which could be categorized as "public information" such as public records, *McCoy v. Providence Journal,* 190 F.2d 260 (1st Cir. 1961) cert.den. 324 US 894, records filed with the Clerk of Court. *In Re Washington Post, et.al.* (US v. Mandel), F.2d (4 Cir.8-19-76) and the transpirations of a public trials, *Craig v. Harney,* 331 US 367 (1947).

As Mr. Justice Stewart stated in an address on the subject of the news media's right to know in 1974:

> "So far as the Constitution goes, the autonomous press may publish what it knows, and may seek to learn what it can. But this autonomy cuts both ways. The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed. *There is no constitutional right to have access to particular government information or to require openness from the bureacracy* . . . . The Constitution in other words establishes the contest, not its resolution. (emphasis added) *United States v. Mitchell,* 386 F.Supp. 639 (D.C.D.C. 1975).

Because the information particularly sought in connection with this civil action does not fall into the class and category of public information this Court does not find that the press has any First Amendment right to gather it.

Turning to the former concept of standing, this Court's order of May 31st does not prohibit the public or press from doing anything but only limits the participants in the criminal case from conducting themselves in certain manners and therefore neither the public nor the press has suffered any personal injury other than the generalized complaint that they have been denied their "right" to know.[3] When the asserted harm or injury, if any, is a "generalized grievance" shared in substantially equal measure by all or a large class of citizens, that harm alone, if any, normally does not warrant exercise of jurisdiction. *Warth v. Seldin,* 422 US 490 (1975). The plaintiffs here make no allegation that the purported injury sustained by them is no greater nor lesser than the public's at large since the injury which they contend is proscribed by the Constitution is no more than the lack of knowledge of certain purportedly newsworthy information. Further, the plaintiffs make no allegation or showing that even if no order existed that the alleged injury would be diminished. Although the plaintiffs aver that the trial participants will not talk to them as a result of the May 31st order, it is merely speculation that the trial participants would voluntarily disclose such information to the plaintiffs in absence of the order. *Simon* (supra)

---

[3] As was noted in Branzburg at ftn 22, citing Zemel, there are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.

Accordingly, this Court finds that the plaintiffs have no standing to assert the particular claims raised herein since they have no right to the particular information sought and since their purported injury is shared by the public in general and is speculatively remedial.

If it were arguable that the plaintiffs do in face have standing to assert their claims then it is apparent to this Court that they are not entitled to the relief they seek. This Court has always recognized that "Courts are a branch of government and a criminal proceeding involving officials holding high positions of public trust must peculiarly remain open for the closest scrutiny and discussion by citizens." *United States v. Mitchell* (supra). It must also be recognized that our system of government in guaranteeing rights to its various citizens also guarantees any citizen accused of a crime the right to a fair and impartial trial, a guarantee which the government has a duty to assure all its citizens. As recognized in *Estes v. Texas*, 381 U.S. 532 (1965), a fair trial, "the most fundamental of all freedoms" must be maintained at all costs. While there is no question that "what transpires in the courtroom is public property," *Craig v. Harney*, 331 US 367 (1947) the Court also has the duty and authority to assure to the extent possible that prejudicial evidence will not be presented to prospective jurors prior to the trial of a criminal case in order to assure that the defendant is tried before the public by a fair and impartial jury.[4] While it is conceded that any order of the

[4] The United States Supreme Court has interpreted the requirement of an impartial jury to mean that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado ex rel Attorney General* 205 US 454 (1907).

Court which is issued to assure a criminal defendant of a fair trial that directly prohibits or restrains publication of information already gained or commentary on judicial proceedings held in public is a prior restraint in violation of the First Amendment and must be justified by a clear and present danger that the defendants' right to a fair trial is in jeopardy; the clear and present danger test does not apply when the Court issues an order such as the May 31st order which does not constitute a prior restraint on the press' or public's right to speak or publish but only restrains the trial participants from certain conduct thereby proscribing the flow of prejudicial information to be gained by non trial participants. Recently, the United States Supreme Court in *Nebraska Press Assoc. v. Stuart*, 427 US 539 (1976) has stated that the trial judge must take strong measures to insure that an accused is accorded a fair and impartial trial, citing *Sheppard* and that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial", the trial judge should continue the case, transfer it, sequester the jury, or see that neither "the accused, witness, court staff, nor enforcement officers coming under jurisdiction of the Court should be permitted to frustrate its functions."

Although the *Nebraska* case may be read that to permit a prior restraint of information already in the hands of the press or public, is to require a clear and present danger to a fair trial, *Nebraska* has approved the standard set out in *Sheppard* that extrajudicial statements of trial participants which divulge prejudicial information may be proscribed if there is a reasonable likelihood that prejudicial news prior to trial will jeopardize the defendants right to a fair trial.[5]

[5] This Court found that there was a substantial likelihood of such when it issued the May 31st order.

The Report of the Kaufman Committee on the operation of the Jury System on the "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968) as adopted by the Judicial Conference of the United States is of like effect. See also *United States v. Tijerina*, 412 F.2d 666 (10 Cir. 1969) cert..den. 396 US 990; *Farr v. Pitchess*, 522 F.2d 464 (9 Cir. 1975) cert.den. 427 US 912 (1976). The conclusion to be drawn from reading *Nebraska* is that proscriptions on trial participants' prejudicial statements in a criminal trial are not to be considered as prior restraints on non-trial participants' First Amendment rights to publish and comment upon judicial proceeding and that proscriptions on trial participants' prejudicial statements are to be judged by the *Sheppard* standard as it regulates the conduct of the participants in the trial.

Prior to entering the May 31st order, from the Court's reading of various newspapers within the State of South Carolina and watching and listening to reports on the broadcast media, this Court took notice of the widely publicized and sensational nature of the criminal case against J. Ralph Gasque, a state senator, and his co-defendants. The publicity was and remains extensive as can readily be evidenced by the collected newspaper clippings presented by the plaintiffs in this action and those presented in the previous proceedings before the Court of Appeals and this collection represents only a portion of the total continuing publicity. The Court has also taken notice of the numerous and extraordinary inquiries made by representatives of the press and news media to this Court concerning this particular criminal case. The Court has also taken notice, that the information contained in the media reports contrary to the assertions of the plaintiffs, is unrestrained and often of a prejudicial nature and would be inadmissable evidence at a trial. All such information, particularly prejudicial information, that is widely

disseminated has the effect of making more difficult the selection of an impartial jury. Selection becomes particularly more difficult when statements of trial participants in particular are widely published. Thus in widely publicized or sensational cases, such as this criminal case, where the statements of trial participants are likely to appear in a widely disseminated manner, there is a substantial likelihood that prospective jurors are unwittingly exposed to statements constituting prejudicial inadmissable evidence that would jeopardize the defendants' right to a fair trial. To the extent that the Court has authority, it is the duty of the Court to prevent that kind of jury prejudice. This Court considered numerous factors pertaining to the extent and nature of the pretrial news coverage of this criminal case and considered whether other measures[6] would be likely to mitigate the effects of likely dissemination of unrestrained comment by the trial participants in this criminal case and concluded and remains convinced that the proscribed prejudicial extrajudicial statements of trial participants are likely to appear in a widely disseminated manner and that without such restraint upon the trial participants as imposed by the May 31st order, there is a substantial likelihood that the defendants would be denied a fair trial. Inasmuch as this Court has determined that the defendants' right to a fair trial is in substantial likelihood of jeopardy without the May 31st restraint on trial participants, the plaintiffs are not entitled to the relief they seek that the order be vacated and the May 31st order will continue to remain in full force and effect.

---

[6] Although the ideal would be to place prospective jurors in sequestration prior to trial it is simply not practical.

The plaintiffs also contend that the May 31st order is vague and overbroad. Specifically, the plaintiffs contend that such terms as "mingling" and "the environs of the court" are not defined and that the order is capable of being read to prohibit conduct that could not reasonably be deemed to represent a threat to the defendants' right to a fair trial on the integrity of the Court. The term "mingling" is found in the second paragraph of the May 31st order and prohibits specified persons (trial participants) from "mingling or being in the proximity of reporters, photographers and others" (non-trial participants) while in the courthouse or on courthouse grounds. That paragraph of the order is no broader than necessary to its appropriate purpose to assure orderliness in and around the courthouse and to effectuate the ban on extrajudicial prejudicial statements by trial participants and the Court has the authority to issue such an order in these circumstances. See "Free Press-Fair Trial" at p. 410. Neither is the term "mingling" vague since it has understandable connotation that trial participants are to avoid situations or confrontations that might compromise the ban on their statements. The term "environs of the court," a term broad enough and specific enough to encompass the courthouse and its grounds which are expected to be fully utilized for this criminal proceeding, is found in paragraph three of the May 31st order which prohibits photographs[7] from being taken or sketch of any juror within the environs of the court. It must be noted that sketching is not prohibited per se, but only in so far as it relates to jurors. The reason for the limited ban on sketching jurors is that for the most part, jurors are new to the courtroom and have a very solemn duty to hear the evidence of the case. From past experience of juror complaints and this Court's own observations, the Court found that jurors are distracted and feel uneasy when they realize that they have become the subject of an artist. Certainly the Court has the authority to prevent activity which distracts the jury from their duty under law. See "Free Press-Fair Trial" at p. 411.[8] At this point, it should also be noted that this Court finds that there is no right by the plaintiffs as members of the press or the public in general to obtain the names and addresses of the prospective jurors in advance of trial as prohibited also by paragraph three of the May 31st order. The management of the jury is a function solely within the authority of the trial court and when the venire is called in open court, there is no question that upon the seating of a juror in a case that his identity will then become a public record.

Neither does the Court feel that the May 31st order unreasonably abridges any public right to know or media right to information since the right, if any, is not denied but merely delayed for a limited period. A defendant is only brought to trial after an indictment by a Grand Jury. The indictment is returned in open court and is a public record. The trial of a defendant is held in open court to

---

[7] The ban on photographs is also consistent with Rule 53, F.R.Crim. P. which prohibits the taking of photographs in the courtroom during the progress of judicial proceedings and is also consistent with the general standing order of this Court issued May 14, 1969. Further, the plaintiffs admit in their reply brief they do not challenge the ban on photographs.

[8] While the Court is aware it has allowed unlimited sketching in other cases, those cases have not been the subject of extensive pretrial publicity as this criminal case or the subject of such public interest.

which all members of the public and media have a right to attend and hear the testimony of the witnesses. Finally, the May 31st order has no purpose or life beyond the trial of the case and no restriction upon any trial participant after the trial of the case. This Court's order unlike that issued in *CBS v. Young* (supra) which incidentally was a civil as opposed to a criminal case, is very limited in purpose time and people affected to assure the defendants a fair trial. It prohibits no conduct other than that which would in substantial likelihood jeopardize the defendants' right to a fair trial and is specifically and narrowly drawn to encompass only certain types of conduct. After the trial anyone can do or say anything they please but until that time comes, the provisions of the May 31st order will remain in full force and effect.

Finally, the plaintiffs contend that the May 31st order was issued without prior notice and hearing to the plaintiffs in contravention of their Fifth Amendment right to due process. This Court does not agree that the news media and public should be given notice and an opportunity to be heard before a Court should be permitted to issue such an order as the May 31st order.[9]

---

[9] The plaintiffs cite *US v. Schiavo*, 504 F.2d 1 (3rd Cir. 1974) cert.den. sub. nom. *Ditter v. Philadelphia Newspapers Inc.*, 419 US 1096 for the proposition that they are entitled to prior notice and hearing. In *Schiavo*, the trial judge issued a collateral order in a criminal case directly against the press who were non-parties to the criminal case but parties to the collateral order since that order prohibited the press from publishing and reporting upon certain statements. The May 31st order in this case does not restrict the press from publishing or reporting at all and is only directed at the conduct of trial participants in the criminal case.

This Court, in imposing the restrictions of the May 31st order has followed the recommendations of the Kaufman Committee, "Free Press-Fair Trial" as adopted by the Judicial Conference of the United States and has not violated established legal concepts in implementing such order.

Accordingly,

IT IS ORDERED that the plaintiffs complaint be and the same is hereby dismissed. The May 31st 1976, order issued by this Court in *United States v. J. Ralph Gasque, et.al.*, No. 76-104 will continue to remain in full force and effect.[10] Let copies of this order be sent to the parties.

/s/ J. Robert Martin, Jr.
UNITED STATES DISTRICT JUDGE

TRUE COPY
Test:
MILLER C. FOSTER, JR., CLERK
/s/ Joyce Kirby
By: Deputy Clerk

---

[10] It is of significant note that this Court, since the inception of this criminal case and forthcoming inquiries by the press, has continuously informed members of the press and public, some of who are plaintiffs to this complaint, that it will be available during the trial to clarify, explain or consider otherwise provisions of the May 31st order they deem necessitate such if they would make a presentation through an appropriate representative committee. Upon an appropriate inquiry, this Court will then examine any provision of the order that merits clarification, explanation or consideration otherwise in light of the requisites of the trial.

APPENDIX D

HARRISON AND PLEICONES
ATTORNEYS AND COUNSELLORS AT LAW
1010 Barringer Building
P. O. Box 11408
Columbia, South Carolina 29211

TELEPHONE:
803/256-0215
256-0216

James C. Harrison, Jr.
Costa M. Pleicones

May 24, 1977

Honorable J. Robert Martin, Jr.
United States Courthouse
Columbia, South Carolina 29201

In re: Central South Carolina Chapter, Society of Professional Journalists, Sigma Delta Chi, *et al.* v. The Honorable J. Robert Martin, Jr., *et al.*

Dear Judge Martin:

We understand that a jury has been selected and has been sequestered in the criminal trial of the Government vs. Ralph Gasque.

We therefore respectfully urge that, in consonance with the spirit of the Order of the Fourth Circuit Court of Appeals decided May 17, 1976, and in view of the Sequestration of the jury, reconsideration be given by the Court to all facets of its Order dated May 31, 1976.

Very truly yours,

HARRISON AND PLEICONES

By _____
James C. Harrison, Jr.

JCHjr/lfj
cc: Wistar D. Stuckey, Esquire
David R. Boyd, Esquire